No. 2336

United States

Circuit Court of Appeals

For the Ninth Circuit

WHITLA & NELSON, a Copartnership, Attorneys for the LANE LUMBER COMPANY, a Corporation, Bankrupt.

Petitioner

vs.

SAMUEL BOYD, Trustee in Bankruptcy of the Lane Lumber Company, a corporation, Bankrupt, and L. C. WILSON, Receiver of the State Bank of Commerce of Wallace, Idaho,

Respendents.

IN THE MATTER OF THE LANE LUMBER COMPANY, A CORPORATION, BANKRUPT

BRIEF OF PETITIONERS ON MOTION TO DISMISS

EZRA R. WHITLA,
RALPH S. NELSON,
In Proper Person.
Residence and P. O. Address,
Coeur d'Alene, Idaho.
Attorneys for Petitioners.

GRAVES, KIZER & GRAVES,
Residence and P. O. Address,
Spokane, Washington,
Of Counsel

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The respondents have filed herein a motion to dismiss this petition upon three grounds:

1. That the petition presents both a question of law for revision and a question of fact, which should be appealable.

2. That the appeal covers questions of law and fact and that revisions permit only questions of law.

3. That the petition for review is not the proper method to bring both the above questions before the Circuit Court of Appeals; no error could be predicated upon the reduction, because it was made upon evidence from which men of different minds might draw different conclusions. An issue of this nature is a question of fact reviewable by appeal and not by petition for review.

The sole trouble with respondents is that they do not understand the questions before the court and are in error upon the entire premises.

First, the petition for revision in this case is based squarely upon *issues of law*. We are not asking the court to review any findings of fact whatever but are asking the court to review the conclusions of law, and that alone.

Second, there are no issues of fact in this case and the District Judge *did not* make any decision upon any *controverted issues of fact*, but based his decision in this case wholly upon the law, and it is upon his construction of the law that this appeal is taken.

Third, the findings of fact in this case were those made by the referee upon *uncontroverted evidence*.

Fourth, The allowance sought by petitioners was not a claim or debt within the meaning of Section, 25a, subdivision 3, but was a cost of administration and reviewable under the provisions of Section 24b.

RESPONDENTS' AUTHORITIES

We have no complaint to make with the authorities cited by respondent other than to say they have no bearing upon the facts in this case. The case of *Postlethwaite v. Hicks*, 165, Fed. 897, was a case clearly within Section 25a, and, therefore, subject to appeal and not to review, and in that case it was a claim or debt incurred before bankruptcy and therefore appealable only under the bankruptcy act.

In Re Irwin et al, 174 Fed. 642, In Re Stewart simply decide that which we do not dispute, namely, 179. Fed., 222, and in *re Witherbee*, 202 Fed. 896, that upon a matter of review this Honorable Circuit Court passes only upon questions of law and does not pretend to decide disputed questions of fact, and we are not asking that to be done in this case.

It is our contention here that this is a controversy arising in the administration of a bankrupt estate and is reviewable under section 24b, and that the bill of petitioners is not a claim or debt within the meaning of section 25a as construed by the United States Supreme Court and also by the Circuit Court of Appeals. It is our contention that the claim or debt there referred to, which gives the jurisdiction for the appeal, is a claim or debt which is provable against the estate of the bankrupt upon him being adjudged such. Holden *v. J. S. Stratton, Trustee*, 191 U. S. 115, 48 L. ed., 116,

in which the Supreme Court of the United States says as follows:

> "And while the word "claim" is used in its signification of the demand or assertion of a right in sub. 11 of par. 2, in respect of "all claims of the bankrupts to their exemptions," it is also used in many parts of the act, and, as we think, in par. 25, as referring to debts (which by subsec. 11 of par. 1 include "any debt, demand or claim provable in bankruptcy" *presented for proof against estates in bankruptcy.*"

In this case it appears that the claim referred to in the third subdivision of Sec. 25a as a debt or claim of $500 or over, means a debt or claim owing by the bankrupt at the time of his adjudication and which is provable against his estate as such.

The words "debt" and "claim" are usually used in the Bankruptcy Act as meaning a debt or claim existing at the time of bankruptcy and something which is then due and owing by the bankrupt and for which an account may be proven against his estate. Section 57 of the Bankruptcy Act provides for the proof and allowance of claims and by a reading of that section of the statute it is plain that the claim mentioned in section 25a, sub. 3, and the filing of proof of which is provided for by section 57 of the Act, and for which the Supreme Court of the United States has, by forms numbered 31 to 37, inclusive, provided for the proper manner of presenting them to the court for allowance, is the claim or debt refer-

red to in Sec. 25a, sub. 3. Again, the *claims* referred to in Sec. 57 are also barred if not filed within one year after the adjudication., sec 57, subdivision N. The allowance sought by petitioners comes under an altogether different provision and comes under that part of the Act providing for the handling of estates, and section 64, subdivision 3, provides for the payment of the *costs of administration,* and these are payable not as a debt or claim, but as a cost of administering the estate, and no form for proving such an allowance is required or provided for by the Bankruptcy Act, and we think it clear that such costs of administration are not included with the words "claim" or "debt," for which the method of appeal is provided by section 25, subdivision 3.

The Circuit Court of Appeals for the Sixth Circuit so speaks of this section and has so specifically held:

W. J. Davidson & Co., v. Friedman, 140 Fed 853

This case is short and direct to the point and is especially valuable because the Honorable Justice Lurton delivered the opinion. In that case it was an *appeal* allowing expenses of administration and the court held that it was not appealable under section 25a, par 3, but was only subject to be brought up by review under section 24b, and said as follows:

> "The matter involved in the present appeal is an expense incurred by the trustee in the course of his administration. *It was not a debt*

against the bankrupt, and had no existence before adjudication. It was therefore one of that class of matters over which this court is given supervisory jurisdiction to "review in matters of law the proceedings of the several inferior courts of bankruptcy," within this circuit. In the case of *In re Mueller*, 135 Fed. 711, 715, 68 C. C. A. 349, 353, we said: "The 'proceedings' reviewable are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate which are not made specially appealable under section 25a 30. Stat. 553 (U. S. Comp. St. 1901, p. 3432).

The court thereupon dismissed the appeal holding that the appeal was not a proper remedy to review costs of administration.

QUESTION OF LAW PRESENTED FOR REVIEW

As stated in our original brief in this case the questions herein are *questions of law* involving the construction of Section 7 of the Bankruptcy Act and section 64b, subdivision 3 of that Act, it being the contention of petitioners that they are entitled, *as a matter of law*, to have their fees allowed on the basis of professional services for the preparation of the schedules. Judge Dietrich refused to allow for these services on the basis of professional services, but allowed for them on the basis of clerical work. (Record, (p. 65, where he states as follows:

"For the labor of gathering together and classifying the data I shall allow compensation as for the *services of an accountant,* at the rate of $15.00 per day for ten days."

This raises a direct question of law as to whether or not the bankrupt in employing counsel to perform the duties required by the Act is entitled to charge therefor at professional rates or at clerical rates. This does *not* involve a *question of fact,* but does involve only a question of law.

Again, Judge Dietrich holds that petitioners did spend at least a large part of the time for which we claim compensation attending meetings of creditors. (p. 69 of record where he says as follows:

"It is doubtless true that the claimants have spent at least a large part of the time in attending the bankruptcy proceedings for which they claim compensation." He then states that he does not base this upon a question of the number of days and does not take this into consideration, and says, after allowing $100 for attending one meeting one particular day: "In that view it becomes unnecessary specifically to find upon the issues whether the attendance covered thirty-seven days, as contended for by the claimants, or only 30 days as asserted by the trustee. *Nor need we determine what would be a reasonable per diem allowance for such attendance, taking into consideration the actual amount of time spent upon each of the several days and the character and* scope of the business then under consideration." In other

words the learned District Judge held, *as a matter of law,* petitioners were not entitled to a per diem compensation while attending the meetings of the bankruptcy court, but appellants contend that, *as a matter of law* they are entitled to reasonable compensation, per diem, for attending these meetings and that the learned District Judge erred in refusing to make such allowance.

Appellants also contend, *as a matter of law*, that they were entitled to an allowance for contesting the Connolly Claim. In the assignments of error herein it will be noticed that there is not an assignment of error attacking any finding of fact, neither is it being asked in this hearing that any finding of fact be set aside but this petition for review is being presented squarely upon the issues of law.

The *only* findings of fact are those made by the referee, and the rule is that such findings made by a referee, *even on conflicting* testimony have every presumption in their favor.

> "Upon the trial of the issues before him the referee had the opportunity of seeing and hearing the witnesses, and he was therefore in a better position to judge of their credibility than are courts, which have before them nothing, but the printed record. The established rule in such cases, from which we see no reason for departing in the present instance, seems to be that the findings of fact, dependent upon con-

flicting testimony, by a judge, master, or a referee, who sees and hears the witnesses testify, have every reasonable presumption in their favor, and should not be set aside or modified, unless it clearly appears that there was error or mistake on his part."

Southern Pine Co. of Georgia et al, v. Savannah Trust Co., 141 Fed. 802, C. C. A. Fifth Circuit.

This being the undoubted rule, then certainly in this case where there was *no conflict* and no evidence introduced by the respondents, the referee's findings of fact most certainly should be conclusive, especially as not a single fact found by the referee is reviewed or even questioned by the District Judge, leaving nothing now for this court to pass upon but apply the law to the findings of fact as they appear in the record. All we ask on this hearing is for the court to apply the law to the facts as found, either in the referee's findings, or if there has been any fact found by the District Judge, then to his finding, but we *do not* ask or seek to have any findings of fact reversed, modified or set aside. The District Judge in passing upon the facts involved in this case decided the matter wholly according to his view of the law, and as the matter is now before this court on the question of whether or not his view of the law was correct or erroneous, it resolves itself simply into a question of law upon the points assigned as error by the appellant and there have been no questions of fact involved and there was nothing for an-

pellants to appeal from under the Bankruptcy Act.

We respectfully submit that the motion to dismiss the appeal should be denied.

Whitla & Nelson

Residence and P. O. Address Coeur d'Alene, Idaho; In Proper Person.

Graves Avis & Graves

Residence and P. O. Address, Spokane, Wash.; Of Counsel.